



THE UNIVERSITY *of* EDINBURGH

## Edinburgh Research Explorer

### EU Unilateralism and the Law of the Sea

**Citation for published version:**

Boyle, A 2006, 'EU Unilateralism and the Law of the Sea', *The International Journal of Marine and Coastal Law*, vol. 21, no. 1, pp. 15-31. <https://doi.org/10.1163/157180806776639466>

**Digital Object Identifier (DOI):**

[10.1163/157180806776639466](https://doi.org/10.1163/157180806776639466)

**Link:**

[Link to publication record in Edinburgh Research Explorer](#)

**Document Version:**

Publisher's PDF, also known as Version of record

**Published In:**

The International Journal of Marine and Coastal Law

**Publisher Rights Statement:**

© Boyle, A. (2006). EU Unilateralism and the Law of the Sea. The International Journal of Marine and Coastal Law, 21(1), 15-31. 10.1163/157180806776639466

**General rights**

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

**Take down policy**

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact [openaccess@ed.ac.uk](mailto:openaccess@ed.ac.uk) providing details, and we will remove access to the work immediately and investigate your claim.



## EU Unilateralism and the Law of the Sea

Alan Boyle\*

Professor of Public International Law, University of Edinburgh

### Introduction: Unilateralism in the Law of the Sea

The subject of this paper is plainly inspired by the EU's introduction of regulations which will progressively restrict single hull oil tankers from using EU ports.<sup>1</sup> In summary, such tankers will not be permitted to carry heavy oil, they will be subject to an accelerated phasing-out scheme and there will be more stringent structural inspections for older ships. These regulations are unilateral only in the sense that the EU has chosen to advance their entry into force ahead of the date for amendments to the MARPOL Convention agreed at IMO.<sup>2</sup> They are otherwise neither unprecedented nor opposed by other maritime states. Moreover, this is by no means the first time that unilateral action has altered the rights of other states at sea, and before turning to the specific question of the opposability of the EU regulations to vessels of non-EU states, it is necessary to stand back and view the EU's practice in a broader context.

First, let us look briefly at how unilateral action has influenced—or in some cases failed to influence—the law of the sea. Some of the most important developments in the law of the sea since 1945 have been the product of unilateral actions by a single state or a small group of states. The Truman Proclamation claiming jurisdiction over the contiguous continental shelf is the best-known example of a claim by a single state leading to the emergence of a whole new body of law, later codified in the 1958 Convention on the Continental Shelf and subsequently confirmed as customary law in the 1969 *North Sea Continental*

\* Professor of Public International Law, School of Law, University of Edinburgh. [alan.boyle@ed.ac.uk]. I am indebted to Tina Collier (LLM class 2004) for research assistance, and to Louise de La Fayette for her insights and helpful suggestions. The views expressed are my own.

<sup>1</sup> EC Regulation 417/2002, amended by Reg. 1726/2003.

<sup>2</sup> See 1973/78 MARPOL Convention, Annex I, regulations 13F and 13G, as amended in 2003.

## 16 THE INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW

*Shelf* case.<sup>3</sup> The crucial element which led to this outcome was the positive response of other states, in some cases claiming their own shelf, in others simply acquiescing in claims made by other states. No state contended that the US claim to continental shelf jurisdiction was illegal or a violation of the rights of other states over the high seas. Nor had any state previously claimed that continental shelf resources were the common property of all states, but the matter had until then scarcely seemed worth considering. The US was in effect asserting an entirely novel rule in respect of resources that were previously unclaimed and largely unknown.<sup>4</sup> When the claim did come, its effect was almost immediately formative of new law.

Iceland's attempt to extend coastal state jurisdiction over high seas fisheries was a less successful example of unilateralism. Iceland opposed the establishment of the six-plus-six-n.m. formula for coastal state jurisdiction over fisheries proposed at UNCLOS I and II. For this reason it did not participate in the 1964 European Fisheries Convention. Its declaration of a 12-mile territorial sea provoked the first dispute with the UK, but this was settled by negotiation. The extension of its exclusive fishery zone to fifty n.m. in 1972, however, provoked further disputes with the UK and Germany which were submitted to the International Court of Justice. In the *Icelandic Fisheries* cases<sup>5</sup> the Court was asked to decide on the legality of Iceland's unilateral extension of its fisheries jurisdiction, on the rights of the UK and the Federal Republic of Germany to continue to fish in this area, and on requirements for co-operation in adopting conservation measures. The Court found that Iceland's claim to a 12-mile exclusive zone was not unlawful, but that the UK and Germany had not acquiesced in or accepted Iceland's claim to an exclusive zone beyond that limit. The fifty-mile exclusive zone claimed by Iceland was therefore "not opposable" to these states. The UK and Germany retained rights to fish beyond Iceland's 12-mile zone, based on historic exercise of high seas freedoms, but Iceland did have preferential rights in the allocation of quotas.

Here we can see the risks of unilateralism when not acquiesced in or generally supported by other states. What this case shows is that existing law cannot be changed unilaterally. The rights of other states cannot be taken away without their agreement or acquiescence. That is the most fundamental weakness of acting alone. However creative or desirable in policy terms, such action is only effective if others also follow the lead. If they do not, a dispute is inevitable.

<sup>3</sup> 1969 ICJ Reports 3.

<sup>4</sup> See A. Hollick, *US Foreign Policy and the Law of the Sea* (Princeton, 1981).

<sup>5</sup> *Icelandic Fisheries Cases (UK v. Iceland)* (Merits), (1974) ICJ Reports 3 and *(FRG v. Iceland)* (Merits), 175. See R. Churchill, 24 *ICLQ* (1975), 82-105.

Nevertheless, Iceland's unilateralism was not without positive benefits. Firstly, its action was not found to be illegal, despite infringing high seas freedoms. The 50-mile exclusive zone would thus be effective against other states which did not object. Second, and much more importantly, the court's judgment left open the possibility of negotiated change. The precedent set by Iceland did appeal to a number of other states, and extended coastal state jurisdiction quickly became a central issue in the UNCLOS III negotiations which commenced in 1974. The 200-mile exclusive economic zone agreed at UNCLOS III in 1976 gave coastal states, including Iceland, a far broader margin of exclusive jurisdiction over fisheries than Iceland had itself claimed.<sup>6</sup> Only two years after their victory in court, the UK and Germany lost the fishing rights in Icelandic waters which they had historically exercised over centuries. Unilateralism may not itself change the law, but it can become an important catalyst for change through negotiation. Within ten years the ICJ had found that the new EEZ represented customary international law.<sup>7</sup>

Canada's experience in two separate disputes with other states over maritime jurisdiction has been very similar. In 1970 Canada adopted the Arctic Waters Pollution Act, giving itself then unprecedented powers to regulate pollution and navigation in a 50-mile zone of Arctic waters. The Act applied to foreign vessels, required them to meet Canadian construction standards for Arctic waters and resulted in protests from the USA. There was little the US could do, however, since Canada had thoughtfully redrafted its acceptance of the ICJ's compulsory jurisdiction to exclude such maritime disputes. Although limited in scope, an influential principle had successfully been established. A strong lobby at the UNCLOS III conference, led by Canada and Australia and supported by the majority of developing states, sought a more general extension of coastal state pollution jurisdiction beyond the relatively limited changes introduced in 1973 by the MARPOL Convention.<sup>8</sup> Reaching agreement on the exclusive economic zone involved a compromise between the more extensive claims of these states and the concerns of maritime nations. Once coastal states had abandoned their support for a broader margin of territorial sea, maritime states were prepared to accept the principle of extended jurisdiction for specific purposes. The central feature of the resulting EEZ regime is that it preserves for all states high seas freedom of navigation within the zone, rather than the more restrictive territorial sea right of innocent passage, in contrast to earlier 200-mile claims made by a number of Latin

<sup>6</sup> 1982 UNCLOS, Articles 56 and 62.

<sup>7</sup> *Malta-Libya Continental Shelf* case (1985) ICJ Reports 15.

<sup>8</sup> 3rd UNCLOS, *Official Records*, ii, 317–20; M. Nordquist and C.H. Park, *Reports of the US Delegation to the 3rd UNCLOS*, 47–51, 74, and 89; R.M. Gonnigle and M. Zacher, *Pollution, Politics and International Law* (London, 1979), Ch. 6; M. Nordquist, *UNCLOS Commentary* (Dordrecht, 1991), iv, 180 ff.

## 18 THE INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW

American states.<sup>9</sup> However, coastal states acquired the power to regulate pollution from sea-bed installations, dumping, and activities within the EEZ, but their jurisdiction over vessels is limited to the application of international rules for enforcement purposes only.<sup>10</sup>

Canada's second foray into unilateral extension of maritime jurisdiction had a similar outcome. Under the 1994 Coastal Fisheries Protection Act and accompanying regulations Canada extended its fisheries enforcement jurisdiction to cover certain high seas stocks beyond the EEZ. Fishing by Spanish and Portuguese vessels was prohibited or controlled; powers of arrest were then exercised in respect of at least one vessel, the *Estai*, a Spanish trawler found contravening the act 245 miles off Canada. Canada's action was supported only by Chile; it represented a serious challenge to the consensus reached during the UNCLOS III negotiations and enshrined in the 1982 Convention. Not surprisingly, Spain initiated a case before the ICJ. However, Canada had once again revised its ICJ declaration in order to exclude such disputes. The case was dismissed for want of jurisdiction.<sup>11</sup>

Clearly this legislation and its enforcement violated general international law (Canada was not then a party to UNCLOS). On any view, and except in cases of hot pursuit, no state had the right to interfere with foreign fishing vessels on the high seas beyond the EEZ.<sup>12</sup> Quite rightly, Spain's position was that "In carrying out the said boarding operation, the Canadian authorities breached the universally accepted norm of customary international law codified in Article 92 and articles to the same effect of the 1982 Convention of the Law of the Sea, according to which ships on the high seas shall be subject to the exclusive jurisdiction of the flag State. . . ."<sup>13</sup> Nevertheless, if Canada was in this case seriously violating international law, its actions once again had significant effects. First, an agreement on fisheries conservation measures was negotiated with the EC.<sup>14</sup> Secondly, the question of conservation of straddling fish stocks was further addressed in UN negotiations and in 1995 an international agreement "implementing" the existing UNCLOS provisions was adopted. While this agreement did not go as far as Canada had wanted, it did introduce new measures for conservation of high seas stocks and high seas enforcement by

<sup>9</sup> 1982 UNCLOS, Articles 56(2), 58. On earlier Latin American claims to 200-mile jurisdiction, see F. Orrego Vicuna, *The EEZ: A Latin American Perspective* (Boulder, 1984), Ch. 2.

<sup>10</sup> Articles 208, 210, 211(5) and (6), 220. However, in deference to Canadian and Soviet policy, Article 234 allows coastal states more extensive powers over foreign ships in ice-covered areas of their EEZs. Article 234 largely vindicates Canada's Arctic Waters Pollution Act.

<sup>11</sup> *Fisheries Jurisdiction Case* (1995) ICJ Reports 87.

<sup>12</sup> *SS Lotus* case (1927) PCIJ Ser. A, No. 10; 1982 UNCLOS, Art. 92.

<sup>13</sup> Spanish Ministry of Foreign Affairs, *note verbale* to the Canadian Embassy, 10 March 1995.

<sup>14</sup> 1995 Canada Agreed Minute on the Conservation and Management of Fish Stocks: see 34 *ILM* 1260, and P. Davies (1995) 44 *ICLQ* 927.

non-flag states.<sup>15</sup> If Canada's action did not itself change the law it once again contributed to the pressure for change coming from other states.

Finally, the least successful exponent of unilateral action has been Chile. In 1998 Chile and the European Community were in dispute about conservation of swordfish stocks in the southeast Pacific. In order to put pressure on the EC to agree to abide by Chilean fisheries conservation regulations, Chile closed its ports to EC fishing vessels. It also negotiated a regional fisheries agreement<sup>16</sup> with neighbouring states under which EC states would be denied the automatic right to share in high seas catch quotas. The EC initiated proceedings in the WTO, alleging violation of the GATT agreement's provisions on transit of goods through ports and import restrictions.<sup>17</sup> Chile responded by initiating proceedings under the 1982 UN Convention on the Law of the Sea, alleging violation of articles on conservation of migratory fish stocks on the high seas.<sup>18</sup> The EC counter-sued, alleging violation of the same UNCLOS provisions, as well as others on regional co-operation and abuse of rights. The dispute was provisionally settled before either case could be heard by the WTO or the ITLOS.

How far Chile's actions amounted to a violation of international law is a matter of dispute between the parties. Chile carefully did not assert the right to arrest EC vessels at sea; in this respect its jurisdictional claims were significantly different from Canada's. On the other hand the Galapagos Agreement did appear to contravene the 1982 UNCLOS by denying third states their right to participate in high seas fishing. Chile has so far gained little from its unilateralism in this dispute, apart from agreement on a scientific research programme into the state of the stocks. The Galapagos Agreement has not entered into force; the EC has not agreed to abide by Chilean conservation measures; the law has not changed. Unlike Canada, Chile is a party to the 1982 UNCLOS. The *Swordfish* dispute falls squarely within the compulsory dispute settlement provisions of UNCLOS and of the WTO, albeit in respect of different issues. The EC is thus in a good position to enforce its treaty rights against Chile—which is precisely the point of UNCLOS compulsory dispute settlement. In this context, unilateralism ceases to be a useful tool for legal change.

What conclusions follow from this brief survey? First, that in some cases unilateralism has resulted either in changes to customary law or treaty law, in others it has not. This is an obvious point. In this respect the reaction of other states matters crucially. Secondly, where compulsory dispute settlement is available, unilateralism is a particularly risky strategy, especially where the challenge is to provisions of the 1982 UNCLOS. It must always be remembered

<sup>15</sup> See 1995 Agreement on Conservation of Straddling and Highly Migratory Fish Stocks.

<sup>16</sup> 2000 Galapagos Agreement.

<sup>17</sup> 1994 GATT, Articles 5 and 11.

<sup>18</sup> *Swordfish case*, ITLOS No. 7 (2001).



that this treaty was negotiated by consensus as a package deal. Its integrity is reinforced by the prohibition of reservations and *inter se* modifications that affect the rights of other states.<sup>19</sup> UNCLOS has in effect a special status, which UNCLOS tribunals are more likely to protect. Changes can be made, but by agreement, not by unilateral action. No international actor is more aware of this than the EU, as its resolute and successful resistance to Chilean pressure in the *Swordfish* case shows. From this perspective it may well be that older examples of successful unilateralism in the law of the sea are nowadays likely to be misleading. Establishing a novel precedent in customary law is one thing; unravelling a laboriously negotiated and almost universally accepted treaty is quite another.

For the EU, emulating such unilateralism is likely to be a double-edged sword. If indulged in successfully, other states will simply follow whatever precedent has been established. Extending EU jurisdiction over foreign ships is an obvious example. Any claim made by the EU will simply encourage other states to make similar claims against EU vessels. The short-lived attempt to apply elements of EU labour law to certain foreign vessels using EU ports is a case in point.<sup>20</sup> Similarly, the EU cannot extend its powers over foreign fishing vessels without undermining the position of its own vessels in foreign ports and fishing grounds. So much is common sense. Unsuccessful unilateralism is far more likely today to result not merely in protest, but in litigation, and probable defeat. Such setbacks are unlikely to be beneficial to whatever position the EU wishes to advance.

A careful appreciation of the powers and responsibilities of coastal and port states under UNCLOS is thus an essential preliminary to consideration of the EU's unilateralism in respect of single-hull oil tankers. The real question here is not whether such action is likely to change the law, but whether it can be done within the limits of existing law.

## I. Regulation of Access to Ports

Firstly, it is accepted in all of the literature that there is no general right of access to ports in international law and that no such right is referred to in the 1982 UNCLOS. On the contrary it is implicit in UNCLOS Articles 25, 211(3) and 255 that states are entitled to regulate or deny access to ports. In the *Military and Paramilitary Activities* case the International Court of Justice also accepted that a state has the sovereign right to regulate access to its ports.<sup>21</sup> Only a dictum in the 1958 *Aramco Arbitration* holds otherwise: "According to

<sup>19</sup> Articles 309, 311(3).

<sup>20</sup> A draft EU Council directive on manning conditions was proposed in 1998 but subsequently withdrawn. It would have had the effect of requiring all seafarers on regular passenger and ferry services between EU ports to be employed on terms and conditions which comply with EU law regardless of the flag of the ship.

<sup>21</sup> 1986 ICJ Reports, paras. 212–13.

a great principle of public international law, the ports of every state must be open to foreign merchant vessels and can only be closed when the vital interests of the state so require".<sup>22</sup> It has been convincingly argued that this dictum is wrong.<sup>23</sup> It has also been convincingly argued that the 1923 Convention and Statute on the International Regime of Maritime Ports does not codify and has not generated a rule of customary international law on access to ports.<sup>24</sup> It follows that in internal waters, including ports, the coastal state is free to apply national laws and determine conditions of entry for foreign vessels, subject only to compliance with the due publicity requirements of Article 211(3) of UNCLOS.

Secondly, the best argument that could be made for port access is based on the right of transit for goods and vessels under GATT Article V. This was the EC's position in the WTO proceedings initiated in the *Swordfish* case. Article V provides in part:

1. Goods. . . ., and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory. . . . is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. . . .
2. There shall be freedom of transit through the territory of each contracting party. . . . No distinction shall be made which is based on the flag of the vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.
- 3.-7. [omitted]

This article has never been interpreted or applied in any WTO Dispute Settlement Body decision. It is clear that it does not apply to ships entering ports in the state of final destination of the cargo they carry. Oil tankers coming to the UK are thus unlikely to be covered. Equally, oil tankers docking at Rotterdam and discharging their cargo for onward distribution elsewhere in Europe will be covered. The principal objective of the article is to eliminate discriminatory treatment of vessels from different countries. Banning, or applying different entry requirements to vessels from some states, while allowing entry to those from other states, might well pose problems under Article V. But it also seems reasonably evident that the article is not as such concerned with regulations affecting construction, safety, or operating standards, provided these are not applied in a discriminatory fashion. A ban on all single hull tankers is thus unlikely to be contrary to Article V. A state which operated only single-hull tankers might possibly argue that such a ban is in fact if not in form

<sup>22</sup> 27 ILR 117 at 212.

<sup>23</sup> Churchill and Lowe, *The Law of the Sea* (3rd ed., 1999), p. 61; A.V. Lowe, 14 *San Diego LR* (1977), p. 597; L. de La Fayette, 11 *International Journal of Marine and Coastal Law* (1996), p. 1, at 15-16.

<sup>24</sup> *Ibid.*



## 22 THE INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW

discriminatory if other states are not similarly affected. In that unlikely eventuality, Article XX could be relied on as a defence, provided it could be shown that the ban was related to the conservation of “exhaustible natural resources” (e.g. the sea).

Thirdly, there may also be a claim to port access under UNCLOS Article 300. That Article provides: “States parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.” It is acknowledged in the Convention that states have the right to regulate access to ports. Any use of that right in bad faith may therefore amount to a violation of Article 300. So might any abuse of the right to regulate access. Churchill and Lowe formulate the abuse of right argument as follows: “It is, however, possible that closures or conditions of access which are patently unreasonable or discriminatory might be held to amount to an *abus de droit*, for which the coastal state might be internationally responsible even if there were no right of entry to the port.”<sup>25</sup>

The EC’s position in the *Swordfish* case was that Chile had not acted in good faith and/or had committed an abuse of right by closing its ports to EC fishing vessels in an unreasonable and discriminatory manner contrary to Article 300. This claim was dependent on showing that Chile had acted unlawfully under Articles 116–119 of UNCLOS in its attempt to control EC fishing on the high seas while refusing to negotiate. Article 300 has not so far been interpreted or applied by any tribunal, although it was part of Australia and New Zealand’s claim in the *Southern Bluefin Tuna* case,<sup>26</sup> and was also relied on by Ireland in the *Mox* case.<sup>27</sup> Neither of these cases involved issues of port access.

Provided EU legislation on double hulls can genuinely be represented as contributing to greater safety and enhanced environmental protection, and provided it is applied in a non-discriminatory manner, no violation of Article 300 is likely to result.

## II. Regulation of Foreign Ships in Port

### – Customary Law

There is no categorical prohibition in international law on states attempting to apply their national law to foreign vessels using their ports. Where activities on board the ship affect the peace and good order of the port state there is no doubt that it is permissible to apply the local law. In *Cunard v. Mellon*,<sup>28</sup> a case concerning the application of US liquor prohibition laws to foreign ships

<sup>25</sup> At p. 63.

<sup>26</sup> Provisional Measures, ITLOS Nos. 3 & 4 (1999); Jurisdiction, 39 ILM 1359 (ICSID, 2000).

<sup>27</sup> *Mox Plant Arbitration* (PCA, 2003).

<sup>28</sup> 262 US 100 (1922).

in US waters, the US Supreme Court held that: "A merchant ship of one country, voluntarily entering the territorial limits of another, subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence. . . . during her stay she is entitled to the protection of the laws of that place, and, correlatively, is bound to yield obedience to them". Although in this case the British Government protested at the US application of its law to foreign ships, it accepted "the strictly legal right of the United States or any other country to impose its jurisdiction on all ships whether national or foreign, within its territorial waters". The UK did point out, however, that it confined its own regulation of foreign ships to matters of safety and welfare of the ship, crew and passengers.<sup>29</sup>

It has not been usual for states to try to regulate the "internal economy" of foreign ships while in port where the peace and good order of the port are not affected. In particular, it has not been the normal practice to apply local labour law to these ships. The US Supreme Court has found that most aspects of US maritime labour legislation (the "Jones Act") do not apply to foreign flagged vessels, even when beneficially owned by US companies and operating regularly to US ports.<sup>30</sup>

Although in part these decisions rest on the conclusion that as a matter of statutory construction Congress did not intend to legislate for foreign vessels, the Supreme Court's judgment in *Lauritzen v. Larsen* also noted that "... courts of this and other concerned nations have generally deferred to a non-national or international maritime law of impressive maturity and universality. It has the force of law . . . from acceptance by common consent of civilised communities of rules designed to foster amicable and workable relations."<sup>31</sup> In several of these cases the British and other governments made representations to the Supreme Court arguing that the application of local law contravened the traditional flag state jurisdiction over the internal economy of the ship. It seems to have been the view of these governments and possibly also of the Supreme Court that port state regulation of employment contravened international law. When a proposal came before the US Congress in 1994 to apply US labour law to foreign ships the European Community made a diplomatic protest. The evidence of diplomatic protest is important because it shows that states have not accepted the permissibility of this kind of legislation. The fact that in response to these protests the US has generally refrained from applying its law to foreign ships is also evidence that it did not believe it had a right to do so.

<sup>29</sup> D. O'Connell, *International Law* (London, 1965), ii, 670.

<sup>30</sup> *Lauritzen v. Larsen* 345 US 571 (1953); *McCulloch v. Sociedad Nacional de Marineros de Honduras* 372 US 10 (1963); *Lopes v. Ocean Daphne* (1964); *Ingres Steamship Co. Ltd. v. International Maritime Workers' Union* 372 US 24 (1963).

<sup>31</sup> 345 US 571 (1953), at p. 160.

### – 1982 UN Convention on the Law of the Sea

In keeping with the traditional position, the 1982 UNCLOS places a duty to regulate administrative, technical and social matters on the *flag state*.<sup>32</sup> This duty includes the regulation of manning, labour conditions and training of crews to the extent necessary to ensure safety at sea. UNCLOS also prohibits a *coastal state* from regulating design, construction, manning or equipment of foreign ships in passage through its territorial waters,<sup>33</sup> unless giving effect to generally accepted international standards on these matters found in IMO and ILO conventions.

With the sole exception of pollution offences,<sup>34</sup> the 1982 UNCLOS contains no provisions on *port state* jurisdiction; it does not prohibit port states from regulating design, construction, manning or equipment of foreign ships in port but nor does it expressly permit them to do so. In this respect the Convention does not change or supersede existing customary law on port state jurisdiction.

### – IMO Regulatory Conventions

The 1974 SOLAS Convention, the 1973/78 MARPOL Convention, and the 1978 STCW Convention set minimum international standards on construction, manning, equipment and training to be applied and enforced by the flag state or by other states within whose jurisdiction a violation occurs. To this extent they recognise that port states have jurisdiction in respect of construction and equipment standards for foreign ships. However, a port state is only given power under these treaties to inspect foreign ships in order to monitor compliance with international standards, and then either to take proceedings in accordance with its own law or to refer the ship to the flag state for prosecution. The involvement of port states in inspection and monitoring of compliance was recognised at its inception as a novel extension of their powers.<sup>35</sup>

No provision of these international agreements allows the port state to set its own national standards on any of these matters, but nor do they prohibit it from doing so. After the *Exxon Valdez* accident, the United States became the first to ban all single hull oil tankers from its ports without waiting for agreement in IMO.<sup>36</sup> The most obvious argument in favour of the lawfulness of this response is that it falls within the customary jurisdiction of a port state to regulate matters affecting the peace and good order of the port because of the risk of accidents and consequential pollution. No state is known to have objected to the US action; it represents a clear precedent for introduction of the EU's

<sup>32</sup> Article 94.

<sup>33</sup> Article 21.

<sup>34</sup> Article 218.

<sup>35</sup> A. Blanco-Bazan, *Implementation of IMO Conventions by Flag and Port States*, in, Law of the Sea Institute, 25th Annual Proceedings, Malmo, 1991.

<sup>36</sup> 1990 Oil Pollution Act. See critical analysis by Valenzuela, in Soons, *Implementation of the LOSC through International Institutions*, 212 ff.

own double-hull regulations. Legislation of this kind remains an unusual assertion of jurisdiction, however; for most states the interests of comity with other nations and freedom of navigation have until now dictated greater restraint in the unilateral regulation of foreign ships.<sup>37</sup>

### III. Coastal State Jurisdiction

#### - In the Territorial Sea

The coastal state's jurisdiction to regulate vessels depends on its sovereignty or sovereign rights over maritime zones contiguous to its coasts. In the territorial sea, the coastal state also enjoys sovereignty, and with it the power to apply national law.<sup>38</sup> The right to regulate environmental protection in territorial waters has been assumed or asserted in national legislation, and in treaties on such matters as dumping or pollution from ships. This right includes three important powers: the designation of environmentally protected or particularly sensitive sea areas,<sup>39</sup> the designation and control of navigation routes for safety and environmental purposes,<sup>40</sup> and the prohibition of pollution discharges.<sup>41</sup>

In each of these respects the coastal state enjoys a substantial measure of national discretion: it is for example free to set stricter pollution discharge standards than the international standards required by the MARPOL Convention. But, as we saw earlier, unlike the earlier Territorial Sea Convention of 1958, or the 1973 MARPOL Convention, which are silent on the point, the 1982 UNCLOS specifically excludes from the coastal state's jurisdiction the right to regulate construction, design, equipment, and manning standards for ships, unless giving effect to international rules and standards, which for this purpose means primarily the MARPOL Convention, and the 1974 Safety of Life at Sea

<sup>37</sup> See generally Churchill and Lowe, *The Law of the Sea*, Ch. 3; O'Connell, *The International Law of the Sea*, Ch. 22.

<sup>38</sup> 1982 UNCLOS, Article 2; Churchill and Lowe, *The Law of the Sea*, Ch. 4; O'Connell, *The International Law of the Sea*, Chs. 19 and 24.

<sup>39</sup> See Mediterranean, Caribbean and Eastern African protected areas protocols, and IMO Res. A.720 (17) on Particularly Sensitive Sea Areas. On PSSAs see IMO Docs. MEPC 33/INF.27 (1992); MEPC 35/INF. 17 (1994); MEPC 36/21/4 (1994) and other materials collected in 9 *IJMCL* (1994). For examples of national legislation see UK Wildlife and Countryside Act, 1981; US Marine Protection, Research and Sanctuaries Act, 1972; Canada Oceans Act, 1996, s. 35.

<sup>40</sup> 1982 UNCLOS, Article 22, which requires states to take into account IMO recommendations, but does not require IMO approval; on routeing in PSSAs see IMO Res. A.720 (17). Mandatory vessel traffic management (VTS) in the territorial sea is provided for under SOLAS 1974, Chapter V, Regulation 8-2; traffic separation schemes (TSS) under the 1972 Collision Regulations Convention. See Fitch, 20 *Harv. ILJ* (1979), 127; Gold and Johnston, in Clingan, *The Law of the Sea, State Practice*, etc., 157; Gold, 14 *JMLC* (1983), 136; Plant, 14 *Marine Policy* (1990), 71; IJlstra, in Soons, *Implementation of the LOSC through International Institutions*, 216. On passage in straits, see 1982 UNCLOS, Article 41, and Oxman, 10 *IJMCL* (1995), 467.

<sup>41</sup> 1972 London Dumping Convention, Article 4(3); 1973 MARPOL Convention, Article 4(2); 1982 UNCLOS, Article 21(1)f.

Convention.<sup>42</sup> The EU would thus have no right under UNCLOS to apply its single hull regulations to tankers in innocent passage through EU waters.

The reason for this exclusion is self-evident: if every state set its own standards on these matters ships could not freely navigate in the territorial sea of other states. This would contravene the most important limitation on the coastal state's jurisdiction with regard to any of the above matters: that it must not hamper the right of innocent passage through the territorial sea or suspend the right in straits used for international navigation.<sup>43</sup> This right is enjoyed by the vessels of all nations, and it is an essential safeguard for freedom of maritime navigation. Foreign vessels do not thereby acquire exemption from coastal state laws, but these laws must be in conformity with international law, and must not have the practical effect of denying passage.<sup>44</sup>

What then can a coastal state legitimately do when a foreign vessel is found violating international pollution regulations in the territorial sea, or when it poses a risk of accidental pollution or environmental harm? What the coastal state cannot do is to close its territorial waters to foreign ships in innocent passage, even where their cargo presents a significant environmental risk, as in the case of oil tankers.<sup>45</sup> Passage in these circumstances does not cease to be innocent, and must be afforded without discrimination. At most, the coastal state will be entitled to take certain precautionary measures to minimize the risk: it may, for example, require ships carrying nuclear materials or other inherently dangerous or noxious substances, such as oil or hazardous waste, to carry documentation, observe special precautionary measures established by international agreements such as MARPOL, or confine their passage to specified sea lanes in the interests of safety, the efficiency of traffic, and the protection of the environment.<sup>46</sup> Following the *Braer* disaster off the Shetland Islands in 1993, IMO also amended the SOLAS Convention to allow coastal states to require ships to report their presence to coastal authorities when entering designated zones, including environmentally sensitive areas.<sup>47</sup>

<sup>42</sup> 1982 UNCLOS, Article 21(2); Article 211(4). See especially the opposing views of Canada and Bulgaria on this question, 3rd UNCLOS, 6 *Official Records*, 109 and 112.

<sup>43</sup> *Corfu Channel Case*, ICJ Rep. (1949), 1; 1958 Territorial Sea Convention, Articles, 14–16; 1982 UNCLOS, Articles 17–19, 24–25; Churchill and Lowe, *The Law of the Sea*, 81 ff., and see generally Ngantcha, *The Right of Innocent Passage and the Evolution of The International Law of the Sea* (London, 1990).

<sup>44</sup> Territorial Sea Convention, Article 17; 1982 UNCLOS, Article 21(4).

<sup>45</sup> 1982 UNCLOS, Article 24(1).

<sup>46</sup> 1982 UNCLOS, Articles 22(2), 23; IMO Res. A578(14), 1985, and see Fitch, 20 *Harv. ILJ* (1979); Gold, 14 *JMLC* (1983); and Plant, in, Ringbom (ed.), *Competing Norms in the Law of Marine Environmental Protection*, 11. See also 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes, Article 4(12) and 1991 Bamako Convention, Article 4(4)(c), *infra*, Ch. 8 n. 152, but see *contra* Haiti, *Note Verbale* of 18 Feb. 1988, in 11 *LOS* (1988), 13 and L. Pineschi, in F. Francioni and T. Scovazzi (eds.), *International Responsibility for Environmental Harm* (Dordrecht, 1991), 299.

<sup>47</sup> 1974 SOLAS, Chapter V, Regulation 8–1. See Warren and Wallace, 9 *IJMLC* (1994), 523; Plant, in Ringbom (ed.), *Competing Norms*, 11.

The application of these principles can be observed in state practice concerning environmentally sensitive areas covered by special areas protocols, or designated by IMO. In such cases the passage of ships may be regulated in order to minimize the risk of adverse environmental effects or serious pollution, but here too, the important point is that while ships may be required to avoid certain areas, the right of innocent passage is not lost.<sup>48</sup> In 1990, Australia obtained IMO designation of the Great Barrier Reef as a “particularly sensitive sea area” within an extended territorial sea and imposed compulsory pilotage requirements.<sup>49</sup> The United States has also designated the Florida Keys as an “area to be avoided” and prohibited the operation of tankers in these waters under the 1972 Marine Protection, Research, and Sanctuaries Act.

Nor does the actual violation of regulations necessarily deprive the vessel of its right of innocent passage. Innocent passage is defined by the 1958 Territorial Sea Convention as passage which is “not prejudicial to the peace, good order or security” of the coastal state. This vague terminology appeared to allow coastal states ample room for subjective judgments of the question of innocence, and it is arguably not an accurate reflection of the treatment of innocent passage in the *Corfu Channel* case. That decision implied a rather more objective test, and it is this approach which is much more fully reflected in Article 19 of the 1982 UNCLOS. This provision was not intended to change the law, but to clarify it in rather more satisfactory terms, which afford less scope for potentially abusive interference with shipping. The significant point is that only pollution which is “wilful and serious” and contrary to the Convention will deprive a vessel in passage of its innocent character, which necessarily excludes accidental pollution or the risk of pollution from having this effect. Moreover, under this formulation, single hull tankers cannot be banned from the territorial sea, since a mere violation of construction standards will not be enough to deprive a ship of its right to innocent passage. Only when ships do lose this right can their entry into territorial waters be denied, or their right of passage terminated.

Customary law probably does allow the coastal state to arrest ships in the territorial sea, however. Both the 1972 London Dumping Convention and the 1973 MARPOL Convention require coastal states to apply and enforce their provisions against all vessels in the territorial sea, *inter alia*, and this right is recognized in the 1982 UNCLOS, subject to that Convention’s provisions on

<sup>48</sup> 1982 Geneva Protocol Concerning Mediterranean Specially Protected Areas, Article 7(e); 1990 Kingston Protocol Concerning Specially Protected Areas, etc., of the Wider Caribbean, Article 5(2)(c); and see IMO, Working Group on Guidelines for Particularly Sensitive Sea Areas, MEPC 29 and 30 (1990). Cf., however, Canada’s Arctic Waters Pollution Act, 1972, and 1982 UNCLOS, Article 234.

<sup>49</sup> Okkesen *et al.*, 9 *IJMC* (1994), 507.



## 28 THE INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW

innocent passage and the existence of clear grounds for suspecting a violation.<sup>50</sup> However, this power will only apply to ships which violate *international* construction standards. A violation of unilaterally adopted regulations on single hulls would not justify arrest in the territorial sea.

The 1982 UNCLOS does not alter these basic principles of customary law or extend the coastal state's rights in the territorial sea. In this context its purpose is simply to clarify and define the limits of those rights. The territorial sea regime envisaged by the Convention is thus a compromise: it offers coastal states power to control navigation and pollution, while preserving rights of passage and international control of construction, design, equipment, and manning standards.<sup>51</sup>

– In the Exclusive Economic Zone

The central feature of the EEZ regime is that it preserves for all states high seas freedom of navigation within the zone, rather than the more restrictive territorial sea right of innocent passage, in contrast to earlier 200-mile claims made by a number of Latin American states.<sup>52</sup> Coastal states acquire responsibility for regulating pollution from sea-bed installations, dumping, and activities within the EEZ, but their regulatory jurisdiction over vessels is limited to the application of international rules for enforcement purposes only.<sup>53</sup>

The effect of this regime is less radical than some coastal states had sought. That in general it does no more than permit them to apply MARPOL and other relevant instruments is evident from the wording of article 211(5) of the 1982 UNCLOS, which refers only to coastal state laws "conforming to and giving effect to generally accepted international rules and standards" for the prevention, reduction, and control of vessel-source pollution.<sup>54</sup> In this context MARPOL regulations and possibly other international standards adopted by IMO thus represent the normal limit of coastal state competence and act as a necessary restraint where there is evident potential for excessive interference with shipping.

Thus, coastal states have acquired little real discretion about the kind of pollution legislation they may apply in the EEZ. In particular, as in the territorial sea, they are denied the power to set their own construction, design, equipment, and manning standards for vessels. Mandatory reporting or routeing schemes

<sup>50</sup> 1972 London Dumping Convention, Article 7; 1973 MARPOL Convention, Article 4(2); 1982 UNCLOS, Article 220(2).

<sup>51</sup> Boyle, 79 *AJIL* (1985), 347. See, however, M'Gonigle and Zacher, *Pollution, Politics, and International Law*, 244–5 for critical analysis of this part of the 1982 Convention.

<sup>52</sup> 1982 UNCLOS, Articles 56(2), 58. On earlier Latin American claims to 200-mile jurisdiction, see Orrego Vicuna, *The EEZ: A Latin American Perspective* (Boulder, Colo., 1984), Ch. 2.

<sup>53</sup> Articles 208, 210, 211(5) and (6).

<sup>54</sup> On the meaning of this phrase, and Molenaar, *Coastal State Jurisdiction over Vessel Source Pollution*, Ch. 10.

require IMO approval if they extend to the EEZ.<sup>55</sup> Even in cases of special circumstances, Article 211(6) of the Convention requires the designation of special areas to be approved by IMO and supported by scientific and technical evidence. Unlike Article 234, such designation does not confer any power to act unilaterally in setting construction or equipment standards for ships entering the EEZ, although it does permit the coastal state to apply unilateral standards relating to pollution discharges or navigation.<sup>56</sup>

Moreover, coastal states are not given full jurisdiction to enforce international regulations against ships in passage in the EEZ. They can do so if the vessel voluntarily enters port,<sup>57</sup> but otherwise their powers in the EEZ itself are graduated according to the likely harm. Only when there is “clear objective evidence” of a violation of applicable international regulations resulting in a discharge of pollution which causes or threatens to cause “major damage” to the coastal state are arrest and prosecution permitted, but where the violation has resulted only in a “substantial discharge” causing or threatening “significant pollution”, the vessel may be inspected for “matters relating to the violation”, that is, in effect, for evidence of the illegal discharge, provided this is justified by the circumstances, including information already given by the ship.<sup>58</sup> The ship may in this case only be detained if necessary to prevent an unreasonable threat of damage to the marine environment.<sup>59</sup> Clearly, none of these provisions empowers a coastal state to arrest tankers in the EEZ simply because they violate applicable construction standards: there must in addition be a “discharge” of pollution. In this form the jurisdiction of coastal states remains a limited one for protective purposes only, but this is consistent with the nature of their rights in the EEZ.

#### IV. Inter Se Agreements under UNCLOS

UNCLOS is replete with references to regional rules, regional programmes, regional co-operation and so on. It makes specific provision for regional co-operation in the case of enclosed and semi-enclosed seas;<sup>60</sup> in the case of fisheries management, regional co-operation and regulation are required if the provisions of the 1982 UNCLOS<sup>61</sup> and the 1995 Agreement on Straddling and

<sup>55</sup> 1974 SOLAS, Regulation V/8 and V/8-1. See Plant, in, Ringbom (ed.), *Competing Norms in the Law of Marine Environmental Protection*, 11.

<sup>56</sup> For a fuller analysis of Article 211(6) and its relationship to PSSAs and MARPOL special areas, see de La Fayette, 16 IJMCL 155 (2001), at 190-2. de La Fayette emphasises the importance of PSSAs in providing additional powers within the EEZ, but these also require IMO approval.

<sup>57</sup> Article 220(1). This power applies only to violations which have occurred “within the territorial sea or the exclusive economic zone of *that* state”.

<sup>58</sup> Articles 220(5) and (6).

<sup>59</sup> Article 226(1)(c).

<sup>60</sup> Articles 122-123.

<sup>61</sup> Articles 61-70, 116-120.

## 30 THE INTERNATIONAL JOURNAL OF MARINE AND COASTAL LAW

Highly Migratory Fish Stocks are to be implemented effectively. Part XII of the Convention, dealing with protection of the marine environment, also makes significant reference to regional rules and standards in various contexts. Clearly, UNCLOS does not prohibit regional agreements.

On the other hand Article 311(3) of UNCLOS limits the power of states to conclude regional agreements which depart from its terms. A final question therefore is whether the EU Regulations might be a violation of this provision. Article 311(3) specifies that other agreements may modify or suspend provisions of the Convention, "provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other states parties of their rights or the performance of their obligations under this Convention."<sup>62</sup>

Are EU regulations or directives "agreements" for the purposes of this article? In principle there is no reason not to treat them as such. It is true that they are not formally regarded as treaties by the EU member states and are not registered at the UN. Nevertheless they are negotiated and adopted by member states, albeit in co-decision with the Parliament, and their legal force derives directly from the EU treaty. If UN Security Council resolutions can be regarded as international agreements for the purpose of Article 103 of the UN Charter,<sup>63</sup> then there is some precedent for regarding other types of legally binding subsidiary instruments adopted under treaty powers as themselves treaties.

The clear implication of Article 311(3) is that the drafters of the 1982 UNCLOS sought to limit the right of parties to derogate from the Convention in later agreements. The assumption is that in the event of conflict the 1982 UNCLOS will prevail. When considering such clauses, the ILC commentary concluded:

The chief legal relevance of a clause asserting the priority of a treaty over subsequent treaties which conflict with it therefore appears to be in making explicit the intention of the parties to create a single "integral" or "interdependent" treaty regime not open to any contracting out; in short, by expressly forbidding contracting out, the clause predicates in unambiguous terms the incompatibility with the treaty of any subsequent agreement concluded by a party which derogates from the provisions of the treaty.<sup>64</sup>

<sup>62</sup> Modelled on Articles 41 and 58 of Vienna Convention on the Law of Treaties.

<sup>63</sup> *Lockerbie Case (Provisional Measures)* 1992 ICJ Reports 114, at para. 42. See B. Simma, *The Charter of the United Nations* (Oxford, 1994), 1124.

<sup>64</sup> ILC, Commentary to draft article 26, para. 7, in Watts, *The International Law Commission* (Oxford, 1999), v. II, at p. 678.

It has been suggested that under Article 311 the later inconsistent agreement is unenforceable even between the parties to it, not simply illegal.<sup>65</sup> Thus, if the EU Regulation does fall within the terms of Article 311 it will not merely be illegal as against non-EU states parties to UNCLOS, it will also be unenforceable as between EU member states, at least as a matter of international law.

The important question therefore is whether the EU double hull regulations adversely affect the object and purpose of the Convention or the rights of parties under the Convention. As presently drafted, the answer is almost certainly no. As we saw above, port states have jurisdiction under general international law to regulate matters affecting the good government of their ports—including pollution control and construction standards. UNCLOS confers no general right of entry to ports. Provided there is no discrimination in its application, a ban on single hull tankers in EU ports does not appear to violate UNCLOS. It thus entails no denial of UNCLOS rights and does not compromise the object and purpose of the Convention.

But if any attempt is made to extend the EU regulation to enforce a ban on passage of single hull tankers in the territorial sea or EEZ, UNCLOS rights and the object and purpose of the Convention would be directly in issue, and then Article 311(3) could come into play.

## Conclusions

In the context of the modern law of the sea, codified in UNCLOS, and constrained by compulsory dispute settlement, unilateralism is unlikely to prove productive for any state party, or for the EU. This is especially so if there is no general international support for the proposed changes. As a policy option for the EU, unilateralism must be used, if at all, with studied restraint if serious legal disputes are to be avoided.

The advance implementation of double-hull regulations for ships entering EU ports is not a true example of unilateralism, however. It rests on no novel jurisdictional claims, violates no rights of third parties, contravenes no article of UNCLOS, and is not inconsistent with the object and purpose of the Convention. There is little for other states to object to in the Regulation. At most it implements in advance measures agreed internationally by IMO. But even without parallel IMO measures, the EU would not be acting unlawfully; analogies with previous unilateral action by Iceland, Canada or Chile are thus inappropriate and misleading. Only if the regulations are subsequently applied to ships in passage in the territorial sea or EEZ will a real problem of unilateral—and potentially illegal—action arise.

<sup>65</sup> The argument is a complex one and cannot be fully reproduced here. See J. Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge, 2003) at pp. 312–3. He relies in part on S. Rosenne, *Breach of Treaty* (Cambridge, 1985), at p. 89, who argues that such agreements may be invalid. The competing view is that Article 311(3) affects only the priority or applicability of inter se treaties, not their validity: see Pauwelyn, op. cit., at pp. 310–311.

